

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

S.M., a minor by and through her parents, C.M. and
D.M., and C.M. and D.M. individually, N.A.
individually, M.S., a minor by and through her
parent S.C., and S.C., individually, K.F., a minor,
by and through her parent, C.F., and C.F.
individually, C.S. a minor by and through her
parent, S.S., and S.S. individually, R.H., a minor by
and through his parent J.H., and J.H. individually,

Plaintiffs,

v.

Case No. 2:21-cv-12707

District Judge Mark A. Goldsmith

Magistrate Judge Kimberly G. Altman

BLOOMFIELD HILLS SCHOOL
DISTRICT, PATRICK WATSON,
and CHARLIE HOLLERITH, in
their individual and official capacities,

Defendants.

ORDER STRIKING DEFENDANTS' OFFER OF JUDGMENT (ECF No. 56)

This is a civil rights lawsuit alleging racial discrimination and racial animus
by Defendants Bloomfield Hills School District, Patrick Watson, and Charlie
Hollerith against Plaintiffs, who are African-American students attending
Bloomfield Hills High School and their parents. Under 28 U.S.C. § 636(b)(1), all
pretrial matters were referred to the undersigned. (ECF No. 29).

On December 29, 2022, Defendants filed an Offer of Judgment under

Federal Rule of Civil Procedure 68. Rule 68 states in relevant part:

(a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

...

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

The Rule makes clear that the time for filing an Offer of Judgment is when the offer is accepted. Otherwise, an unaccepted Offer of Judgment may be filed after a final judgment in order to petition the court for costs. As stated by the Sixth Circuit,

The rule contemplates that whether jury or judge tries the case the decisionmaker will be unaware of the extraneous fact that an offer of judgment has been made. This ensures that the trier of fact will not be influenced in its evaluation of the case by any knowledge of a rejected offer or the consequences thereof.

Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294–95 (6th Cir. 1989). As another court has put it,

Rule 68 is really unambiguous-its first sentence provides only for the service of offers of judgment on the adverse party, while its second sentence calls for filing of the offer only if the adverse party accepts it within ten days after such service. By strong negative inference, that latter reference to filing if and when the offer is accepted confirms the

plain meaning of Rule 68's first sentence that no filing is permitted at the time of tender.

St. Paul Fire & Marine Ins. Co. v. City of Detroit, No. CIV.A. 06-CV-14191, 2007 WL 4126542, at *1–2 (E.D. Mich. Nov. 16, 2007) (citing *Kason v. Amphenol Corp.*, 132 F.R.D. 197, 197 (N.D. Ill. 1997)).

Here, there is no indication that Plaintiffs accepted the Offer of Judgment nor has there been a final judgment in this case. As such, Defendants' filing is improper. The remedy is to strike the document from the docket.

[T]he defendant should not file the offer with the court, but if that is done ... the remedy is to strike the offer from the court's file. If the offer is accepted, the offer and acceptance will be filed. If it is not accepted, the offering party can prove it at the proper time to defeat costs.

Id. (quoting 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3002 (2d ed. 1997) (footnotes omitted)); *see also Brock v. Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am.*, 682 F. Supp. 1415, 1433 (E.D. Mich. 1988) (“As the filing was in contravention of Fed.R.Civ.P. 68, the Court shall grant the motion to strike.”) (judgment vacated on other grounds).

Accordingly, Defendants' Offer of Judgment (ECF No. 56) is STRICKEN.

SO ORDERED.

Dated: January 4, 2023
Detroit, Michigan

s/Kimberly G. Altman
KIMBERLY G. ALTMAN
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on January 4, 2023.

s/Carolyn M. Ciesla
CAROLYN M. CIESLA
Case Manager